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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY RM DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ART ALEJANDRO SANCHEZ,

Defendant.

CASE NO. 99CR1245
06CV0159

ORDER GRANTING MOTION FOR
FILING MOTION FOR EXTENSION
OF TIME LATE; GRANTING
MOTION FOR EXTENSION OF
TIME; DENYING MOTION FOR
APPOINTMENT OF COUNSEL;
DENYING MOTION TO PROCEED
IN FORMA PAUPERIS

I. Introduction

Defendant moves, *inter alia*, for an extension of the 10-day time period for filing a notice of appeal. For the reasons set forth below, that motion is granted.

II. Background

On September 13, 1999, defendant pled guilty to conspiracy to traffic in stolen vehicles in violation of 18 U.S.C. § 2313(a) and 18 U.S.C. § 371. On September 11, 2000, defendant was sentenced to 10 months in custody, to be served consecutive to a sentence imposed in 00CR1573K, a drug case. This court also imposed a three year term of supervised release and a special assessment penalty of \$100.

On January 23, 2006, defendant filed a motion pursuant to 18 U.S.C. § 3582 in which he sought the dismissal of outstanding warrants. This court denied that motion in an Order filed April 25, 2006. Defendant filed a notice of appeal which was filed on the court docket

1 on May 17, 2006. He also filed a motion for appointment of counsel and a motion to proceed
2 *in forma pauperis*.

3 In an Order filed June 23, 2006, the Ninth Circuit directed this court to provide
4 defendant with notice and an opportunity to request that the time for filing the notice of appeal
5 be extended based on a showing of excusable neglect. In an Order filed July 7, 2006,
6 defendant was given until July 24, 2006 to file a motion requesting such an extension.
7 Defendant ultimately filed his request for extension of time on August 17, 2006, along with
8 a motion to file the motion for extension of time late.

9 **III. Analysis**

10 **A. Motion to Proceed In Forma Pauperis**

11 To the extent that defendant may be seeking to proceed *in forma pauperis* in this court,
12 defendant's motion is denied as moot because this court does not require filing fees at this
13 time. To the extent that defendant is seeking to proceed *in forma pauperis* on appeal, such a
14 motion is properly filed in the Ninth Circuit.

15 **B. Motion for Appointment of Counsel**

16 Defendant has filed a corresponding motion for appointment of counsel in which he
17 seeks counsel for the purpose of representing him regarding his motion to proceed *in forma*
18 *pauperis*. Because the motion to proceed *in forma pauperis* is moot, this motion appears moot
19 as well. However, if defendant is actually seeking counsel on appeal, he should file an
20 appropriate motion with the Ninth Circuit.

21 **C. Motion for Filing Motion for Extension of Time Late and Motion for**
22 **Extension of Time**

23 As a preliminary matter, defendant's motion requesting that he be allowed to file his
24 motion for extension of time late is granted.

25 Although a notice of appeal in a criminal case must be filed within 10 days of the entry
26 of the order being appealed, when a notice of appeal is filed more than 10 days but less than
27 30 days after the entry of the order, the failure to timely file the notice of appeal may be
28 excused if the defendant is able to demonstrate excusable neglect. See Fed.R.App.P. 4(b)(4);
United States v. Prairie Pharmacy, Inc., 921 F.2d 211, 212 (9th Cir. 1990); United States v.

1 Stolarz, 547 F.2d 108, 112 (9th Cir. 1976).

2 Here, defendant, who has been incarcerated at all relevant times, represents that he did
 3 not receive the court's order until May 1, 2006, and he further represents that he turned his
 4 notice of appeal over to the prison officials for mailing on May 11, 2006. Pursuant to Houston
 5 v. Lack, 487 U.S. 266 (1988), notices of appeal are considered filed as of the date they are
 6 handed to prison officials for mailing. Thus, although defendant filed his notice of appeal more
 7 than ten days after the entry of the order denying his motion, he did file it within 10 days of
 8 receiving the court's order, which suggests diligence on defendant's part. In addition,
 9 defendant argues that because his motion was assigned a civil case number as well as a
 10 criminal case number, he mistakenly believed that he had 30, not 10, days to file his notice of
 11 appeal. Given defendant's *pro se* status and his diligence upon receiving the court's April 25,
 12 2006 Order, the court concludes that defendant has demonstrated excusable neglect and should
 13 be allowed to proceed with his appeal.

14 **IV. Conclusion**

15 Defendant's Motion for Filing Motion for Extension of Time Late is granted. The
 16 Motion for Extension of Time is granted. The Motion to Proceed In Forma Pauperis and
 17 Motion for Appointment of Counsel are denied as Moot. **The Clerk shall serve a copy of this**
 18 **Order on the Clerk of Court for the Ninth Circuit Court of Appeals.**

19 **IT IS SO ORDERED.**

20 DATED: 10/4, 2006


 21 **JOHN S. RHOADES, SR.**
 22 United States District Judge

23 cc: All parties
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